93-471

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

COY U. SPAWN, JR.,

Petitioner,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Under the Supreme Court's "commercial activities" test in *Loeffler v. Frank*, must the Federal Deposit Insurance Corporation pay a depositor pre-judgment interest on wrongfully withheld deposit insurance?

2. In an Equal Access to Justice Act trial on remand, does a District Court which concludes on the evidence that a governmental agency did not meet its burden of proof on "substantial justification" and relies on a Court of Appeal's "arbitrary and capricious" finding against the governmental agency on the merits, commit an abuse of discretion allowing the Court of Appeals to substitute its opinion for the District Court's fact findings?

RULE 14.1(b) LIST OF PARTIES

The parties to the proceeding in the Fifth Circuit Court of Appeals and other courts below are:

COY U. SPAWN, JR., Petitioner,

FEDERAL DEPOSIT INSURANCE CORPORATION, Respondent.

Western Bank-Westheimer was the financial institution liquidated by the FDIC and has been dismissed from the Case.

There are no corporations or other government agencies who are parties to this proceeding.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

COY U. SPAWN, JR.,

Petitioner,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, COY U. SPAWN, JR., respectfully prays that this Court grant this Petition for Writ of Certiorari to resolve two FDIC and RTC deposit insurance issues.

1. Under the Supreme Court's "commercial activities" test in *Loeffler v. Frank*, must the Federal Deposit Insurance Corporation pay a depositor pre-judgment interest on wrongfully withheld deposit insurance?

The Court is requested to resolve the conflict between the Fifth Circuit Court of Appeals, the D.C. Circuit Court of Appeals and the Federal Circuit Court of Appeals, and to clarify the application of *Loeffler v. Frank* to agencies

other than the U.S. Postal Service and to causes of action other than Title VII suits.

2. In an Equal Access to Justice Act trial on remand, does a District Court which concludes on the evidence that a governmental agency did not meet its burden of proof on "substantial justification" and relies on a Court of Appeal's "arbitrary and capricious" finding against the governmental agency on the merits, commit an abuse of discretion allowing the Court of Appeals to substitute its opinion for the District Court's fact findings?

Petitioner requests this Court to resolve the conflict between the Fifth Circuit Court of Appeals and First Circuit Court of Appeals, and clarify the application of *Pierce v. Underwood* to the EAJA standard of review and burden of proof on "substantial justification" for a governmental agency's position which has been reversed on the merits as "arbitrary and capricious," or "not in accordance with the law."

OPINIONS BELOW

The United States District Court's Findings of Fact and Conclusions of Law stated orally into the record are reproduced as Appendix B.

The Fifth Circuit Court of Appeals' Opinion is reported as *Spawn v. Western Bank - Westheimer & FDIC*, 989 F.2d 830 (5th Cir.1993), *reh'g den'd* and is reproduced as Appendix A.

JURISDICTION

The Fifth Circuit Court of Appeals' Judgment and Opinion were filed on May 4, 1993.

The Fifth Circuit Court of Appeals' denial of rehearing was filed on June 21, 1993.

This Court has jurisdiction to review the judgment and opinion of the Fifth Circuit Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES & REGULATIONS INVOLVED IN THIS CASE

1. **12 U.S.C. § 1819 (Fourth).**

   Upon June 16, 1933, the Corporation shall become a body corporate and as such shall have power to sue and be sued, complain and defend, in any court of law or equity, state or federal.

2. **12 U.S.C. § 1821(a)(1982).**

   The Corporation shall insure the deposits of all insured depository institutions as provided in this chapter. The maximum amount of the insured deposit of any depositor shall be $100,000.

3. **12 U.S.C. § 1822(b)(1982).**

   Payment of insured deposit as discharge from liability

Payment of an insured deposit to any person by the Corporation shall discharge the Corporation, and payment of a transferred deposit to any person by the new bank or by an insured depository institution in which a transferred deposit has been made available shall discharge the Corporation and such new bank or other insured depository institution, to the same extent that payment to such person by the depository institution in default would have discharged it from liability for the insured deposit.

4. **28 U.S.C. § 2412(d)(1)(A)(1980).**

Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

5. **28 U.S.C. § 2412(d)(1)(B)(1980).**

A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees

and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses are computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

6. **12 C.F.R. 330.9(b)(1987).**

Qualifying joint accounts. A joint deposit account shall be deemed to exist, for purposes of insurance of accounts, only if each co-owner has personally executed a deposit account signature card and possesses withdrawal rights. The restrictions of this paragraph shall not apply to co-owners of a time certificate of deposit or to any deposit obligation evidenced by a negotiable instrument, but such a deposit must in fact be jointly owned.

STATEMENT OF THE CASE

1. In July, 1986 Mr. Coy U. Spawn, Jr. deposited $100,000.00 of his separately owned funds into Western

Bank - Westheimer, and his sister deposited $100,000.00 of her separately owned funds into the same financial institution.

2. On October 1, 1987, the Texas State Banking Commissioner declared Western Bank - Westheimer insolvent and appointed the Federal Deposit Insurance Corporation ("FDIC") as Receiver for this Texas state chartered bank.

3. On or before October 2, 1987, the FDIC determined that Mr. Spawn's certificate of deposit in the amount of $100,000.00 was uninsured. By October 3, 1987, the FDIC paid those deposits which the FDIC determined to be insured deposits.

4. Subsequently, Mr. Spawn sued the FDIC in federal district court for the $100,000.00 principal amount, plus pre-petition interest, plus attorney's fees under the Equal Access to Justice Act ("EAJA").

5. The Federal District Court, the Honorable Sim Lake presiding, granted summary judgment in favor of the FDIC. Mr. Spawn appealed to the Fifth Circuit of Appeals. The legal issue was whether the relevant regulations allowed the FDIC to aggregate the siblings' two $100,000 certificate of deposits which were "joint with right of survivorship" accounts based on equal withdrawal rights, or required the FDIC to determine the actual ownership of the certificate of deposit accounts.

6. On appeal, the Fifth Circuit reversed and remanded the case to the district court for a determination of whether Mr. Spawn's certificate of deposit, although styled as a joint tenancy with the right of survivorship with

his sister, was in fact an account separately owned by him and therefore separately insurable by the FDIC up to $100,000.00. *Spawn v. Western Bank - Westheimer and Federal Insurance Corp.*, 925 F.2d at 885 (5th Cir.1991) (hereinafter *"Spawn I"*).

7. The second sentence of one of the regulations on which the FDIC principally relied to aggregate both accounts into one $100,000 insured deposit provided: "The restrictions of this paragraph shall not apply to co-owners of a **time certificate of deposit** or to any deposit obligation evidenced by a negotiable instrument, **but such a deposit must in fact be jointly owned.**" 12 C.F.R. 330.9 (1987) (emphasis added).

8. The Fifth Circuit agreed with the FDIC's position with respect to accounts in general, but held that the second sentence of the regulation "**plainly established**" a different test for certificate of deposit accounts. *Spawn I*, 925 F.2d at 888. Upon an analysis of all the regulations at issue, the Fifth Circuit summarized that: " ... the FDIC's interpretation of the regulations at issue contradicts the **unambiguously expressed** directions they contain." *Spawn I*, 925 F.2d at 889 (emphasis added). Accordingly, the Fifth Circuit reversed under the "arbitrary and capricious" or "not in accordance with the law" standard of review.

9. On remand after *Spawn I* and just before trial, the FDIC acknowledged and stipulated that Mr. Spawn solely owned the deposit at issue, and thus was entitled to deposit insurance in the amount of $100,000 separate from his sister's deposit of $100,000. However, the FDIC denied Mr. Spawn Equal Access to Justice Act ("EAJA") attorney's fees and denied Mr. Spawn interest on the wrongfully withheld deposit.

10. On August 21, 1991, the District Court, the Honorable Sim Lake again presiding, held an evidentiary trial on the merits of the EAJA issues and interest issues. The District Court entered judgment in favor of Mr. Spawn for: the $100,000.00 principal amount of the insured deposit owned by Mr. Spawn; $43,834.99 for EAJA attorney's fees; $4,215.47 for reasonable costs and expenses under the EAJA; $39,061.07 for prejudgment interest from the date the deposit would have been paid if the FDIC originally had determined Mr. Spawn to be insured, through the date of trial; and post-judgment interest pursuant to 28 U.S.C. § 1961.

11. The District Court took into evidence approximately twenty-five exhibits and heard oral testimony regarding "substantial justification", "bad faith", and other EAJA issues, with the majority of the testimony being from Ms. Margaret L. Martin, the FDIC officer who made the original decision to deny Mr. Spawn deposit insurance, and from Mr. Coy U. Spawn, Jr., the depositor. (Trial Transcript, pp. 7-78).

12. Subsequent to the parties resting, the District Judge specifically asked and discussed with the FDIC the justification for its position under the second sentence of Section 330.9(b). (Trial Transcript, pp. 105-108. See Appendix "D").

13. The District Judge stated in conclusion of law numbers one and two the burden of proof, the definition and application of the term "substantially justified", and that the EAJA determination was based on the entire record pursuant to *Pierce v. Underwood*. (Trial Transcript. pp. 111 & 112. See Appendix "B".)

14. The first sentence of the District Court's first fact finding is: "FDIC has not established that its position was substantially justified." (Trial Transcript, p. 112. See Appendix "B"). The District Court then explained that because he did not have any conclusive evidence that FDIC was substantially justified and the Fifth Circuit held that the FDIC's position was arbitrary and capricious or otherwise not in accordance with the law, that he was awarding EAJA attorney's fees to the prevailing party. (Trial Transcript p. 112. See Appendix "B").

15. The District Court concluded as a matter of law that pursuant to the Supreme Court's *Loeffler v. Frank* opinion that Congress had intended to waive the FDIC's sovereign immunity from suit on deposit insurance determinations, and all incidents to suit including pre-judgment interest.

16. The FDIC appealed the award of pre-judgment interest, and also the award of EAJA attorney's fees on grounds that FDIC was substantially justified in its interpretation of the regulation. The Fifth Circuit of Appeals reversed. *Spawn v. Western Bank - Westheimer & Federal Deposit Insurance Corp.*, 989 F.2d 830 (5th Cir.1993)(*Spawn II*).

17. Mr. Spawn now files this Petition for a Writ of Certiorari to the Fifth Circuit on *Spawn II*.

FEDERAL JURISDICTION IN THE COURTS BELOW

The United States District Court had jurisdiction pursuant to 12 U.S.C. §§ 1819, 1811 (1982).

The United States Court of Appeals for the Fifth Circuit had jurisdiction to review the District Court judgment and opinion pursuant to 28 U.S.C. § 1291.

ARGUMENT FOR GRANTING WRIT OF CERTIORARI

I. FDIC Immunity from Pre-judgment for Wrongfully Withheld Deposit Insurance.

The first question for this Court's consideration is whether the Federal Deposit Insurance Corporation must pay a depositor pre-judgment on wrongfully withheld deposit insurance under the "commercial activities" test set forth by this Court in *Loeffler v. Frank*, 486 U.S. 549, 108 S.Ct. 1945, 100 L.Ed.2d 549 (1988). Petitioner requests this Court to resolve the conflict between the Fifth Circuit Court of Appeals, the D.C. Circuit Court of Appeals and the Federal Circuit Court of Appeals, and to clarify the application of *Loeffler v. Frank* to agencies other than the United States Postal Service and to causes of action other than Title VII suits.

Application and Clarification of Loeffler v. Frank to the FDIC and Deposit Insurance Determinations.

Loeffler v. Frank provides the "commercial activities" waiver of sovereign immunity for "sue and be sued" governmental agencies which Congress has authorized to engage in commercial and business transactions with the public. *Id.* This Court has established that a governmental agency which Congress: (1) has launched "into the commercial world"; and (2) has included a sue-and-be-sued clause in its charter; and (3) has not expressly delimited the

"sue and be sued" clause with regard to interest awards, is liable for pre-judgment interest to the extent that interest is recoverable against a private party as a normal incident of suit. *Loeffler*, 486 U.S. at 556-7, 108 S.Ct. at 1969-1970, 100 L.Ed.2d at 558.

In *Loeffler*, the governmental agency was the United States Postal Service and the cause of action was a Title VII discrimination suit under the Civil Rights Act of 1964. Several district courts have held that *Loeffler* applies to the FDIC and Resolution Trust Corporation ("RTC"), and have accordingly awarded pre-judgment interest on wrongfully withheld deposit insurance. However, the Circuit Court of Appeals have split on this issue.

The Conflict Between the Circuits.

The D.C. Circuit Court of Appeals held that: "Mindful of the general rule that the United States is not liable for interest on claims against it in the absence of statute or contract, we are satisfied that the rule is not applicable to this situation. ... FSLIC is a separate corporate body, invested with powers, duties, and responsibilities which, in the judgment of Congress require that it have the power to sue and be sued under 12 U.S.C. s 1725(c)(4); also, FSLIC is in the insurance business and is assumed to have accepted the ordinary incidents of suits in such business." *North New York Sav. Bank v. Federal Sav. & Loan Ins. Corp.*, 515 F.2d 1355, 1364 (D.C. Cir. 1975).

The Fifth Circuit specifically disagreed with the D.C. Circuit, *Spawn v. Western Bank - Westheimer & Federal Deposit Ins. Corp., 989 F.2d 830, 838* (5th Cir. 1993) (hereinafter *"Spawn II"*), and held that the FDIC is immune from prejudgment interest awards in the context erroneous

deposit insurance determinations. *Id* at 838. "In our view, the FDIC is not engaged in a commercial enterprise when it acts as insurer of deposits, but rather as a protector of the banking system and the general welfare." *Spawn II*, 989 F.2d at 838.

This holding conflicts with the Federal Circuit Court of Appeals. "The FDIC's statutory authorization to sue and be sued in any state or federal court accommodates the commercial and business context in which this agency operates." *Far West Federal Bank v. Office of Thrift Supervision & Federal Deposit Ins. Corp.*, 930 F.2d 883, 888 (Fed. Cir. 1991). The Federal Circuit applied *Federal Housing Admin, Region No. 4 v. Burr*, 309 U.S. 242, 60 S.Ct. 488, 84 L.Ed.2d 724 (1940), the predecessor to *Loeffler*, to hold that the FDIC's "sue and be sued" clause was intended by Congress to waive the FDIC's sovereign immunity from suit and that such waiver included all ordinary incidents of suit, including the equitable relief of recision and restitution. *Far West Federal*, 930 F.2d at 888-9 (citing *North New York Savings* with approval).

The Fifth Circuit purports to follow the Tenth Circuit in *Philadelphia Gear* in holding that the FDIC is immune from prejudgment interest on erroneous deposit insurance determinations. However, *Philadelphia Gear* involved only an express waiver of sovereign immunity analysis and did not discuss the "commercial enterprise exception" to waiver of sovereign immunity. *Philadelphia Gear Corp. v. Federal Deposit Ins. Corp.*, 751 F.2d 1131 (10th Cir. 1984), rev'd on other grounds, 476 U.S. 426, 106 S.Ct. 1931, 90 L.Ed.2d 428 (1986). Thus, the Tenth Circuit cannot be properly included as a circuit having ruled on this first issue presented in this Application for a Writ of Certiorari.

The Importance to the Public: Depositors Need a Uniform Rule on Deposit Insurance.

The general public needs to know whether, as a depositor in an FDIC insured financial institution, they are entitled to interest on their deposit in the event the FDIC erroneously determines that their deposit is uninsured. Depositors trade a decreased interest return on their money for a perceived increased security of their money, as opposed to higher interest bearing but potentially higher risk investments with uninsured institutions such as insurance companies. Due to the time value of money, the general public is entitled to know whether and under what circumstances such insurance includes interest to compensate for a delay in receiving their money subsequent to a bank being closed.

More importantly, the disparity among the circuits is patently unfair to the general public. Currently, insured depositors in Washington, D.C. are entitled to interest on wrongfully determined deposit insurance, and insured depositors in the Fifth Circuit are not. This issue requires a uniform rule. Petitioner requests this Court to provide this rule.

Although the FDIC recently repaid the United States Treasury all the funds which the FDIC borrowed since 1990 together with interest, the FDIC will not pay interest on deposit insurance wrongfully determined and withheld from an insured depositor, without court order. Petitioner respectfully requests this Court to provide this order.

II. The Abuse of Discretion Standard of Review and Agencies' Burden of Proof on "Substantial Justification" of an Agency Position Which was Held to be "Arbitrary and Capricious".

The second question for this Court's consideration is whether in an EAJA trial on remand, a District Court which concludes on the evidence that a governmental agency did not meet its burden of proof on "substantial justification" and relies on a Court of Appeal's "arbitrary and capricious" finding against the governmental agency on the merits, commits an abuse of discretion allowing the Court of Appeals to substitute its opinion for the District Court's fact findings? Petitioner requests this Court to resolve the conflict between the Fifth Circuit Court of Appeals and First Circuit Court of Appeals, and to clarify the application of *Pierce v. Underwood* to the EAJA standard of review and burden of proof on "substantial justification" for a governmental agency's position which has been reversed on the merits as "arbitrary and capricious" or "not in accordance with the law". Is the "arbitrary and capricious" holding on the merits part of the record to be considered pursuant to 28 U.S.C. § 2412(d)(1)(B) in determining "substantial justification"?

Application and Clarification of Pierce v. Underwood to "Substantial Justification" for a Governmental Agency's Position which has been Reversed on the Merits as "Arbitrary and Capricious" or "Not in Accordance with the Law."

"*Pierce v. Underwood* establishes an "abuse of discretion" standard of review of a District Court's "substantial justification" determination. *Pierce v.*

Underwood, 487 U.S. 552, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988) "Not infrequently, the question will turn upon not merely what was the law, but what was the evidence regarding the facts." *Pierce*, 108 S.Ct. at 2547. "In addition to furthering the goals we have described, it will implement our view that a "request for attorney's fees should not result in a second major litigation." *Pierce*, 108 S.Ct. at 2549 (citation omitted). In *Pierce*, the original district court judgments were against the government and were not on an "arbitrary and capricious" standard of reviewing agency action.

This Case presents a common fact pattern which arises when the district court rules in favor of the governmental agency on the merits, a Court of Appeals reverses on grounds that the governmental agency's position was "arbitrary and capricious" or "not in accordance with the law", and then on remand or otherwise the Plaintiff files an EAJA suit in the district court. This fact pattern complicates the EAJA determination with the interaction of: an "arbitrary and capricious" position versus a "substantially justified" position; the effect of an initial governmental agency victory in district court on the merits; and a governmental agency's burden of proof to explain or justify a position which has been rejected by the court of appeals as contradicting the unambiguously expressed directions of the plain language of the regulation. The ultimate issue is whether a district court which holds an evidentiary EAJA trial, concludes that the governmental agency has not met its burden of proof, and then relies on the previous "arbitrary and capricious" or "not in accordance with the law" finding to award attorney's fees to the prevailing party, has committed an abuse of discretion. The circuit court of appeals have split on this issue. The question hinges on a question of law: whether the "arbitrary and capricious"

holding on the merits is part of the record to be considered on "substantial justification" pursuant to 28 U.S.C. § 2412(d)(1)(B).

In this Case, the District Court, held an evidentiary trial on the merits of the EAJA issues. The district court took into evidence approximately twenty-five exhibits and heard oral testimony from the FDIC and the depositor regarding "substantial justification", "bad faith", and other EAJA issues. (Trial Transcript, pp. 7-78).

The District Judge stated in conclusion of law numbers one and two the burden of proof, the definition and application of the term "substantially justified", and that the EAJA determination was based on the entire record pursuant to *Pierce v. Underwood*. (Trial Transcript. pp. 111 & 112. See Appendix "B".)

Subsequent to the parties resting, the District Judge specifically asked and discussed with the FDIC the justification for its position under the second sentence of Section 330.9(b). (Trial Transcript, p. 105-108. See Appendix "D"). Judge Lake began the conversation with:

> "The Fifth Circuit didn't have any opinion finding that the FDIC's interpretation was an abuse of discretion, which indicates to me perhaps a reasonable person wouldn't have reached that decision. How does the FDIC justify its interpretation of 330.9(B) as being controlled by 330.1(B)(1)?"

(Trial Transcript, p. 105. See Appendix B.)

The Conflict Between the First and Fifth Circuits.

In reviewing the EAJA Trial in this Case, the Fifth Circuit held that deference to the District Court's fact findings was not necessary because the District Court's determination was infected with an error of law. *Spawn II*, 989 F.2d at 840. The Fifth Circuit held that the District Court equated "arbitrary and capricious" and "not in accordance with law" *ipso facto* to "not substantially justified." *Id.* The Fifth Circuit did not discuss the weight or deference which the Court of Appeals should accord to the district judge holding an evidentiary hearing on EAJA attorney's fee, discussing with the FDIC the FDIC's justification for its position, finding that on the evidence the agency did not meet its burden of proof on "substantial justification", and the fact that the same district judge presided at the original merits hearing and at the subsequent EAJA trial on remand.

The First Circuit Court of Appeals, in considering this same fact pattern, held that the District Court did not abuse its discretion in awarding EAJA attorney's fees. *Sierra Club v. Secretary of Army,* 820 F.2d 513 (1st Cir. 1987).

> While it is true that the district court considered *Sierra I* in determining the reasonableness of the government's position, *i.e.,*the presence or absence of substantial justification, such consideration was by no means inconsistent with the duty of independent inquiry. After all, an analysis of the degree to which agency actions were or were not warranted cannot sensibly be made in a vacuum; prior proceedings in connection with this case must be taken into account. It

> would have been foolhardy-and wrong-for the district court, in calibrating the scales of substantial justification, to have pretended that our opinion in *Sierra I* did not exist, or to have ignored it.

Sierra Club, 820 F.2d at 518. "[W]e deem the court below to have meant that our decision in *Sierra I* preclude[d] a finding of substantial justification not because it was *our* decision, not because the government lost, not because the agency action ... was held to be arbitrary-but because the areas of weakness and inconsistency which *Sierra I* laid bare undermined the government's claim that waiver of an EIS had been substantially justified." *Sierra Club*, 820 F.2d at 518

The Fifth Circuit held that the District Court's original grant of summary judgment in favor of the FDIC's position is a factor weighing in favor of the FDIC in indicating that the District Court abused its discretion. *Spawn II*, 989 F.2d at 840. The First Circuit rejects this position. "To the extent that the defendants' district court victory deserved consideration, there is no reason to doubt that it was considered. The EAJA determination was made by the same district judge who had presided at the trial. It taxes credulity to ask us to believe that he overlooked his own earlier decision in analyzing the legitimacy of the government's position." *Sierra Club*, 820 F.2d at 519.

Impact on EAJA Litigation: Uncertainty in EAJA Litigation of Governmental Agency Positions.

EAJA litigants need to know their burden of proof on "substantial justification" in a case where governmental agency action has been reversed under the "arbitrary and capricious" or "not in accordance with the law" standard.

Prevailing parties cannot make a reasonable determination whether to pursue a separate EAJA suit without knowing the agency's and their own burden of proof. EAJA litigants need to know whether a "substantial justification" finding is made in the context of the previous ruling on the merits, as held by the First Circuit Court of Appeals, or in a vacuum.

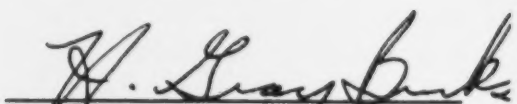
District Courts and Circuit Courts of Appeals need to know whether consideration of the "arbitrary and capricious" finding on the merits in the separate EAJA trial constitutes an abuse of discretion.

Under the current status of the case law, the standard of review, what constitutes the "record" for purposes of "substantial justification", and the burden of proof for EAJA trials on a governmental agency position which is reversed under the "arbitrary and capricious" standard is uncertain. Petitioner requests this Court to bring certainty into EAJA litigation of governmental agency positions.

CONCLUSION/PRAYER

For the foregoing reasons, Mr. Coy U. Spawn, Jr. respectfully requests this Court to grant a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the two issues presented to this Court in this Case.

Respectfully submitted,



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